GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v. JANGKA PRESTASI SDN BHD

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
LEE SWEE SENG JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-2505-12-2018]
30 APRIL 2020

CONTRACT: *Agreement – Sale and purchase agreement – Whether genuine transaction or sham agreement – Inconsistencies in deposit sum to be paid in first and second sale and purchase agreement – Whether dissonance and discrepancy between terms of sale and purchase agreement and conduct of parties indicated illegal moneylending transaction – Whether sale and purchase agreements amenable to remedy of specific performance – Whether sale and purchase agreements enforceable – Whether device of using sale and purchase agreement as security for loan to circumvent prospective provisions of Moneylenders Act 1951 – Whether sale and purchase transaction designed to disguise moneylending transaction – Whether sale and purchase agreement illegal, null and void*

MONEYLENDERS: *Moneylending transaction – Sale and purchase agreement – Whether device of using sale and purchase agreement as security for loan to circumvent prospective provisions of Moneylenders Act 1951 – Whether dissonance and discrepancy between terms of sale and purchase agreement and conduct of parties indicated illegal moneylending transaction – Whether sale and purchase transaction designed to disguise moneylending transaction – Whether sale and purchase agreement illegal, null, void and unenforceable*

This appeal sought to unravel the singular problem of whether a sale and purchase agreement was a genuine transaction or a sham designed to bypass the mandatory and strict requirements of the Moneylenders Act 1951 ('Moneylenders Act'), non-compliance of which would make the agreement unenforceable in being null and void for breach of statutory prohibitions. At the High Court, the respondent ('plaintiff') claimed for specific performance and for the removal of the appellant's ('defendant') caveat against a piece of property and damages to be assessed for wrongful entry of the private caveat by the defendant to prevent the transfer of two pieces of land on which stood two lots ('the property'). Apparently, the transfer could not be effected because when the defendant was alerted by its bank that there was a surplus from its redemption of its loan with its bank CIMB Islamic Bank, it raised the alarm that it had not instructed the redemption and that it had not agreed to sell the property to the plaintiff. The defendant's defence was that it was an unlicensed moneylending transaction for a loan of RM1.2m which it admitted having borrowed through its director, Dato' Zamry from one Dato' Adly through his nominated company, the plaintiff. The loan was disbursed to the defendant's associate company, Global Globe Maintenance

Sdn Bhd. According to the defendant, Dato' Adly instructed Dato' Zamry to go and see his solicitors Messrs Nohairi & Co to sign all the documents prepared as a collateral for the loan before the loan would be released. Dato' Zamry duly complied and executed the documents on the understanding that the sale would not be effected but that it was just a collateral for the plaintiff in case anything should happen to him or that he should be adjudged a bankrupt. The defendant said in its defence that though the loan was for RM1.2m, the sale and purchase agreement ('first SPA') had stated the deposit paid as RM1.6m. The defendant pleaded that the difference of RM400,000 was the interest charged by the plaintiff for the repayment of the loan within three months or the receipt of the sum claimed in court by the defendant against Jabatan Kerja Raya ('JKR'). It was later discovered by the defendant during the stage when the plaintiff applied for summary judgment under O. 81 of the Rules of Court 2012 ('ROC') that there was another different sale and purchase agreement exhibited, previously unbeknown to the defendant, with the same date and purportedly the same signatures. Under this second sale and purchase agreement ('second SPA'), the deposit was reduced to RM780,000. The differences in the two SPAs were also in the description of the property that it should be 4½ storey shop *cum* office building rather than a four storey shop *cum* office building and the registration number of the defendant company. According to the defendant, the second directors' resolution was asked for by the plaintiff from the defendant to furnish subsequently when the misdescription of the building was discovered by the CIMB Bank Bhd that was approached by the plaintiff for a loan. By that time, the defendant had discovered the plaintiff's intention to effect a transfer of the property at the stated purchase price of RM5.2m when the defendant said the market value was easily RM8m to RM9m. However, having found that the defendant failed to prove that the second SPA was a forgery, the trial judge proceeded to grant the plaintiff its prayers for specific performance of the second SPA, the removal of the defendant's caveat against the property and an assessment of damages for the caveat wrongfully entered by the defendant to prevent the transfer and charge from being registered. Hence, this appeal by the defendant. The issues that arose were (i) whether the plaintiff had sufficiently explained away the inconsistencies in the deposit sum in the first SPA, the second SPA and in the statement of claim; (ii) whether the dissonance and discrepancy between the terms of the SPA and the conduct of the parties pointed towards the transaction being a security for an illegal moneylending transaction; (iii) whether the sale and purchase agreement and related documents were a sham and thus not amenable to the remedy of specific performance; and (iv) whether the sale and purchase agreement and the loan agreement were unenforceable being not in compliance with the Moneylenders Act.

A B C D E F G H I

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) It was very strange and aroused suspicion when the first SPA duly signed, dated and stamped should on the same day itself be changed by lowering the deposit sum to RM780,000 in the second SPA. The fact that the first SPA had been stamped by franking just like the second SPA would suggest that both were designed to convey the aura of genuineness to be used as appropriately depending on when either SPAs had to be produced in court. It did not make sense for the plaintiff to agree to this. However, the reason was not difficult to find; the plaintiff was equally concerned that the defendant does not turn around to say that only RM780,000 was actually paid because there was the first SPA which would have to surface, if the defendant tried to be 'funny' by disputing the deposit paid. By the time the plaintiff had to sue for specific performance, there was more to lose by not exhibiting the second SPA, for if it were to exhibit the first SPA, it would be difficult for it to explain how the RM1.6m had been paid at the date of signing the SPA when only RM1.2m was released to the defendant. The plaintiff had not explained how the first SPA had reflected a sum of RM1.6m when only RM1.2m was paid. If indeed the first SPA had been cancelled, then it was baffling that the defendant still had a copy of it and not having at all a copy of the second SPA. (paras 35, 52, 53, 55, 57 & 58)

(2) This was a case where the plaintiff and its solicitors got more tangled in a web of camouflage and caught in a comedy of errors for not coming clean on the real transaction which was that of a moneylending transaction with the SPA prepared as a collateral for the loan. Fortuitously, the plaintiff fumbled at those critical and telling moments that cry out for an explanation but they were not forthcoming. The facade resting on a false foundation fell with it. The dissonance was disturbing enough to destroy the cornerstone of a cover-up. This court was more than satisfied that the dissonance between the terms of the SPA, the conduct of the parties and the overall circumstances of the case, more than support on the balance of probabilities, the defendant's contention that the SPA and the related documents were a cloak to conceal the real substance of an illegal moneylending transaction charging exorbitant interest of RM400,000. (paras 96-98)

(3) The dissonance between the terms of the SPAs and the conduct of the parties was disturbing. The fact that basic terms were flouted or not followed would point to the parties having a comfort level that could only be achieved because of a separate agreement. The whole unconvincing episode led thus to three sums stated as deposit: RM120,000 in the statement of claim, RM1.4m in the first SPA and RM780,000 in the second SPA. The deposit to the plaintiff did not really matter for it already had the defendant in its full grip. It was more

likely than not that the second SPA was not given to the defendant and the plaintiff must have thought that it was better to exhibit the second SPA for the loan was approved based on the second SPA and furthermore it would not have to explain why there was a stated RM1.6m paid under the first SPA. Alas, but for the vigilance of the defendant's solicitors, this discrepancy might not have been discovered for both were dated and stamped the same date. Courts would not lend its aid to enforce pretended obligations. Having started off as a sham agreement, good for the optics, the plaintiff could not have transformed it into a real one and go for the jugular. It became an instrument to oppress and exploit which the law would intervene to protect the more vulnerable victim. This court was convinced, on the balance of probabilities, that the SPAs were a sham, standing up like a sore thumb, when its terms were brushed aside with no compunction of what tomorrow may bring simply because undergirding it was the real transaction of illegal moneylending business where the plaintiff was more than secured, both in the sense of collateral and legal position, to act leisurely and 'legally' as it may be pleased. The SPAs were unenforceable especially when the remedy of specific performance prayed for was an equitable remedy. (paras 107, 119, 120, 121, 122, 128 & 129)

(4) The plaintiff did not have a moneylending license. In light of the presumption in s. 10OA of the Moneylenders Act, a presumption is drawn that it is a moneylending transaction. The plaintiff had not adduced any evidence to rebut the presumption and the stand taken by the plaintiff was that it was a sale and purchase of property transaction. Having made that election, the plaintiff could not resile from it and indeed did not lead evidence to rebut the presumption. The plaintiff being an unlicensed moneylender, the agreement was unenforceable (s. 15 of the Moneylenders Act). The law in the Moneylenders Act requires all 'moneylending agreement' to be in writing and here the agreement was oral and what was in writing was a sham sale and purchase agreement. By keeping the moneylending agreement oral but by getting the upper hand in making the defendant borrower sign all the relevant documents relating to and including a sale and purchase agreement, the plaintiff was visibly trying to take the moneylending transaction outside the pale and protection afforded to a borrower under the Moneylenders Act. The device of using a sale and purchase agreement as a security for a loan was clearly to circumvent the protective provisions of the Moneylenders Act. Even if the plaintiff lender was not a moneylender at all, it would be an aberration to allow such a person charge an interest of RM400,000 for a loan of three months when even a licensed moneylender would blush under it. A

person who was not a moneylender could not under the guise of a friendly loan exact more onerous terms than what a licensed moneylender was permitted as that would turn the law upside down. (paras 139, 140, 141, 142, 143 & 152)

(5) The protection afforded by a charge or a lien is that a proper application for an order for sale under the National Land Code ('NLC') had to be proceeded with to realise the security with the need to apply to the High Court in case of a registry title and the need to exhibit the necessary current valuation report of the property charged for the purpose of fixing the reserve price at the public auction. All these to be preceded by the service of a notice to remedy the breach as prescribed under the NLC and with the implementation now of *e-lelong* there is a further enhancement to the integrity of the public auction system where only those genuinely interested to bid may do so. The transaction was illegal as it was forbidden by the Moneylenders Act and further, if allowed, would defeat the purpose of the law. It was also against public policy. The transaction was caught by s. 24(a), (b) and (e) of the Contracts Act 1950. (paras 153 & 154)

(6) Even if the sale and purchase agreement was not a sham and that the plaintiff was not a moneylender, the relief of specific performance being an equitable relief would not be granted in a case where the plaintiff lender had openly flouted the requirement of creating a proper charge or statutory lien under the NLC as security for the friendly loan. The trial judge had thus misdirected himself and had not sufficiently appreciated the evidence before him which pointed inexorably to the proper inference to be drawn that indeed the sale and purchase transaction was designed to disguise a moneylending transaction and an illegal one at that. The sale and purchase agreement was illegal, null and void and unenforceable. (paras 155 & 156)

Case(s) referred to:

AG Securities v. Vaughan & Ors [1990] 1 AC 417 ***(refd)***
Donald v. Baldwyn [1953] NZLR 313 ***(refd)***
Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] 1 LNS 661 CA ***(refd)***
Gangabai v. Chhabubai AIR [1982] SC 20 ***(refd)***
Hitch And Others v. Stone (Inspector of Taxes) (2001) STC 214 ***(refd)***
Lau Song Seng & Ors v. PP [1998] 1 SLR 663 ***(refd)***
Lee lng Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lee Pooi Chun v. Lee Kah Gee [1971] 1 LNS 59 FC ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Menta Construction Sdn Bhd v. SPM Property & Management Sdn Bhd & Anor [2017] 1 LNS 675 HC ***(refd)***
Motorola Malaysia Sdn Bhd v. Ng Thien Keong & Anor [2011] 5 CLJ 564 HC ***(refd)***
Muhibbah Teguh Sdn Bhd v. Yaacob Mat Yim [2005] 4 CLJ 853 HC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
Pannir Selvam Sinnaiyah & Anor v. Tan Chia Foo & Ors [2019] 1 LNS 2031 HC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***
Seascope Sdn Bhd v. Syed Izhar Syed Syed Salleh [2005] 8 CLJ 624 HC ***(refd)***
Sembagavally Murugason v. Tee Seng Hock [2019] 1 LNS 1086 HC ***(refd)***
Snook v. London And West Riding Investments Ltd [1967] 2 QB 786
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24(a), (b), (e)
Evidence Act 1950, ss. 92, 114(g), 115
Moneylenders (Control and Licensing) Regulations 2003, reg. 10(1), (2), Schedule K
Moneylenders Act 1951, ss. 2, 10OA, 15, 16, 17A(1), (3), 27(2), (3), 29AA(1)
National Land Code, ss. 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 264A, 265, 266, 266A, 267, 267A, 268, 268A, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282
Rules of Court 2012, O. 81

Other source(s) referred to:
Sarkar's Law of Evidence, LexisNexis, Malaysian edn, vol 11, p 2212

For the appellant - Ragumaren Gopal & Ishraf Hakim Mohd Nadzri; M/s G Ragumaren & Co
For the respondent - Abu Daud Abd Rahim & Nazri Hussin; M/s Nik Nazri & Wan

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22NCVC-505-09-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] How does one knows when a sale and purchase agreement is actually a cloak for an illegal moneylending transaction where interest is charged by an unlicensed moneylender which under the Moneylenders Act 1951 is unenforceable? Unscrupulous moneylenders would of course try to leave no trace of any moneylending transaction. At the same time, there may well be cases where having signed a sale and purchase agreement, a party may later have had a change of mind and tried to wriggle out of it by alleging it is a sham to cover up an illegal moneylending transaction.

[2] When confronted with two versions, one by the plaintiff (respondent) saying that it is an ordinary sale and purchase transaction and another by the defendant (appellant) saying it is a sham sale and purchase agreement meant only as a collateral to the moneylending transaction, the court would have to comb the evidence carefully to see if there are gaps that could not be explained away in the sale and purchase transaction and unusual features that will militate against a genuine sale and purchase transaction as well as the conduct of the parties.

[3] This appeal seeks to unravel the singular problem of whether the sale and purchase agreement is a genuine transaction or a sham designed to bypass the mandatory and strict requirements of the Moneylenders Act 1951, non-compliance of which would make the agreement unenforceable in being null and void for breach of statutory prohibitions.

Proceedings In The High Court

[4] At the High Court, the plaintiff claimed for specific performance and for removal of the defendant's caveat against the property and damages to be assessed for wrongful entry of the private caveat by the defendant to prevent a transfer of two pieces of land on which stand two lots of a 4½ storey shop office ("the property") which bear the name Wisma Global Globe.

[5] Apparently the transfer could not be effected because when the defendant was alerted by its bank that there was a surplus from its redemption of its loan with its bank CIMB Islamic Bank Bhd, it raised the alarm that it had not instructed the redemption and that it had not agreed to sell the property to the plaintiff.

[6] The defendant's defence was that it was an unlicensed moneylending transaction for a loan of RM1.2m which it admitted having borrowed through its director Dato' Zamri bin Rahmat (DW3) from one Dato' Adly bin Kamarudin through his nominated company, the plaintiff. The loan was disbursed to the defendant's associate company Global Globe Maintenance Sdn Bhd. DW3's friend, one En Mohd Syazwal bin Israini had introduced Dato' Adly to him.

[7] According to the defendant, Dato' Adly instructed Dato' Zamri to go and see his solicitors, Messrs Nohairi & Co and to sign all the documents prepared as a collateral for the loan before the loan would be released.

[8] The DW3 duly complied and executed the documents on the understanding that the sale would not be effected but that it was just a collateral for the plaintiff in case anything should happen to him or that he should be adjudged a bankrupt.

[9] Dato' Zamri duly furnished the security in the property and deposited the relevant documents with the said solicitors.

[10] The defendant said in its defence that though the loan was for RM1.2m, the sale and purchase agreement ("first SPA") at pp. 496 to 512 of the record of appeal, dated and stamped on 9 February 2015, had stated the deposit paid as RM1.6m. The defendant pleaded that the difference of RM400,000 is the interest charged by the plaintiff for repayment of the loan within three months of the receipt of the sum claimed in court by the defendant against Jabatan Kerja Raya ("JKR").

[11] It was later discovered by the defendant during the stage when the plaintiff applied for summary judgment in encl. 6 under O. 81 of the Rules of Court 2012, that there was another different sale and purchase agreement ("SPA") exhibited, previously unbeknown to the defendant, with the same date and purportedly the same signatures and also a second directors' resolution which the company secretary (DW5), subpoenaed to give evidence, testified was not found in her minutes book (see pp. 494 to 495 of the record of appeal). The difference with the first directors' resolution, at pp. 491 to 493 of the record of appeal, was that the second one had stated the shop office to be "4½ storey".

[12] Under this second sale and purchase agreement ("second SPA") at pp. 513 to 529 of the record of appeal, dated and stamped the same date as the first SPA, the deposit was reduced to RM780,000.

[13] We do not have any good reason not to believe her as she was merely discharging her duty as a professional company secretary who has no interest in the outcome of the transaction.

[14] The differences in the two SPAs were also in the description of the property in that it should be 4½ storey shop cum office building rather than a four storey shop cum office building and the registration number of the defendant company.

[15] According to the defendant, this second directors' resolution was asked for by the plaintiff from the defendant to furnish subsequently when the misdescription of the building was discovered by the CIMB Bank Bhd that was approached by the plaintiff for a loan. By that time the defendant had discovered the plaintiff's intention to effect a transfer of the property at the stated purchase price of RM5.2m when the defendant said the market value was easily RM8m to RM9m.

[16] The plaintiff through its director PW1 explained that the second SPA was with the defendant's consent and for the purpose of obtaining a bigger loan from its bank.

[17] The learned High Court Judge heard that the defendant had not proved that the signatures in the second SPA were a forgery by calling a handwriting expert and he further accepted that the second SPA had cancelled the first SPA though there was no written document to the effect.

[18] There were other unusual features of the sale and purchase transaction, which according to the defendant, would more than indicate that the sale and purchase transaction is nothing but a subterfuge and a smokescreen.

[19] The learned trial judge was not impressed with and certainly not influenced by the above so-called aberrations or anomalies to a genuine SPA. As no reasons were given by the learned trial judge as to why he had dismissed these unusual features as not affecting a jot the validity of the second SPA, this court on appeal shall consider each one of them to see if taken together as a whole, would lend credibility to the defendant's assertion that the sale and purchase transaction was a sham and a cloak to cover up an illegal moneylending transaction.

[20] Having found that the defendant had failed to prove that the second SPA was a forgery, the learned trial judge proceeded to grant the plaintiff its prayers for specific performance of the second SPA, removal of the defendant's caveat against the property and an assessment of damages for the caveat wrongfully entered by the defendant to prevent the transfer and charge from being registered.

[21] The defendant is the appellant before us and the plaintiff, the respondent. For consistency, the parties shall be referred to as the plaintiff and the defendant as they were so-referred to in the High Court.

[22] The first SPA and second SPA when referred to collectively shall be called "the SPAs" and when it is immaterial which SPA is applicable for the terms and conditions are the same save for the amount of the deposit sum, and also when used generically the reference "SPA" shall be used.

Principles

[23] Whenever an allegation is made that an agreement and related documents prepared are a sham to camouflage what the law specifically prohibits, the court must tread cautiously and comb carefully the evidence presented. It is only to be expected that generally all tracks would be covered so as not to leave behind anything coming close to resemble a smoking gun.

[24] On the one hand, there must be certainty in written agreements executed as meaning what they say and on the other hand, there will always be the nefarious elements in society that are bent on circumventing the law without being exposed for what it is.

[25] To wring one's arm in despair would be to allow the law to be ridiculed and rendered toothless. One must also always bear in mind the rationale for the prohibition by the statute that declared any agreement not in compliance with the Moneylenders Act 1951 as being unenforceable, and the mischief of the Act and the amendments thereto were designed to overcome.

[26] We also kept in the forefront of our mind that as an appellate court, we must be slow to intervene to set aside findings of fact of the trial judge who had had the audio-visual advantage of hearing, the witnesses. We reminded ourselves that before such a finding is set aside, we must be satisfied of the errors of the trial judge if not corrected would result in injustice to the appellant. We must be satisfied that there has been sufficient critical analysis of all relevant evidence before the trial judge for preferring with cogent reasons given, one version to the other.

[27] Some of the factors to be considered are summarised in *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149 at p. 154 by the Court of Appeal as follows:

> [8] Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:
>
> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) **there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him**;
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> (c) **the trial judge has completely overlooked the inherent probabilities of the case**;
>
> (d) **that the course or events** affirmed by the trial judge could not have occurred;
>
> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
>
> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;
>
> an appellate court will intervene to rectify that error so that injustice is not occasioned. (emphasis added)

[28] The Court of Appeal in *Lee lng Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 at p. 33 stated afresh the principle of appellate intervention and the meaning of judicial appreciation of the evidence before the trial judge as follows:

> **Principles of appellate intervention**
>
> Very recently, this court in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon And Other Appeals* [2003] 1 CLJ 585 reviewed some of the leading authorities on appellate intervention and identified the general rule of appellate non-interference. We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice to say that we re-affirm the proposition

A that *an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision*. But appellate interference will take place in cases where there has been *no or insufficient judicial appreciation of the evidence*. It is, we think appropriate that we say what judicial appreciation of evidence involves.

B A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may C have in giving his evidence. *If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case*. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the D issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered. (emphasis added)

[29] It is against that backdrop and caution that we now consider this E appeal by the defendant/appellant.

Whether The Plaintiff Had Sufficiently Explained Away The Inconsistencies In The Deposit Sum In The First SPA, The Second SPA And In The Statement Of Claim

F **[30]** The plaintiff pleaded in its statement of claim that it paid RM1.2m as deposit to a related company of the defendant, Global Globe Maintenance Sdn Bhd by way of four cheques prepared and dated 5 February 2015 just a few days before the date the first SPA was executed on 9 February 2015.

[31] Encik Nohairi ("PW2") testified that he had known the plaintiff and G its director Encik Mohd Rizaki bin Toogiman ("PW1") for some time as he had acted for him in a few transactions and they are in the same building. It is safe to presume that the said Messrs Nohairi & Co being the solicitors on record for the plaintiff, would have taken instruction as to the amount of deposit that would be paid upon the signing of the SPA. As the cheques had H been handed to his firm on 5 February 2015, he would have known of not just the amount of the deposit which is RM1.2m but also that it is not payable to the plaintiff but a related company of the plaintiff and prudence would require that to be stated in the SPA.

[32] The defendant is not represented by any solicitors for the sale and I purchase transaction and we would say, it would be discouraged by the plaintiff from being separately represented as Dato' Adly had told Dato' Zamri that if he wanted the loan then he must go and execute all the necessary documents as may be prepared by his solicitors Messrs Nohairi & Co.

[33] We might as well add here that in a lot of sham transactions camouflaging the illegal moneylending transaction, a common feature seems to be that the solicitors for the lender/"purchaser" would also act for the borrower/"vendor" but that instructions would be given by and taken from the lender/"purchaser".

[34] The borrower/"vendor" would have little say for it would not want to be seen as being difficult as in not helping to expedite the early release of the loan. Human nature being what it is as a desperate borrower one would be rather compliant and certainly not confrontational; with little bargaining power.

[35] It is very strange and indeed would arouse suspicion when the first SPA duly signed, dated and stamped should on the same day itself be changed by lowering the deposit sum to RM780,000 in the second SPA. The plaintiff has no compunction about it because it seems to think that even if it is a lie, it does no harm to the bank, in this case CIMB Bank Bhd that finally decided to give a loan to the plaintiff of RM3,380,000. The plaintiff said that was done with the defendant's consent for it does no harm to the defendant for the purchase price remained the same at RM5.2m and moreover it might, as the plaintiff explained, enable it to get a bigger loan compared to a case where the plaintiff had already paid RM1.2m.

[36] Here again we think the defendant has little choice, even if it had agreed and signed the second SPA but to agree for a borrower should not be picky about an arrangement that does it no harm but might do the plaintiff some good. It is a case of "I scratch your back and you scratch mine."

[37] The learned trial judge misdirected himself when he said that since it's the defendant that had asserted the signatures of their two directors were forged, the burden is on the defendant to prove it.

[38] The burden of proving that the document is genuine is on the party who produces it, and asserts its validity, regardless of the fact that it was the other party who alleges that the document was forged. The Federal Court in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 (FC), declared as follows at p. 458:

> In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine.

[39] By casting the burden of proof on the defendant, the learned judge had misdirected himself and thus he concluded erroneously that the second SPA had been validly executed by the defendants (see paras. [21], [26] and [38]. See also the case of *Sembagavally Murugason v. Tee Seng Hock* [2019] 1 LNS 1086 where this issue was raised and addressed).

[40] Of all people involved in this strange and rather surreptitious way of doing things, the solicitor handling the transaction should have forewarned himself that there was something fishy there and the exposure to being accused of assisting in an unlicensed moneylending transaction for s. 29AA(1) of the Moneylenders Act 1951 warns that any person who assists a moneylender in contravention of the Moneylenders Act 1951 shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding twenty thousand ringgit or to both. As unlicensed moneylenders would invariably want the documents prepared to have an air and aura of legality, they would need the assistance of solicitors to create respectability if not to give the stamp of approval and legality.

[41] Encik Nohairi (PW2) had put himself in an unenviable position – more precisely a conflict of interest situation. He had decided to take the road less travelled by having decided to act on record for the plaintiff and off the record for the defendant as well in completing the transaction with a letter of authorisation to act being signed by the defendant. His rationale for excusing his conduct was that both the parties were aware of it and that he was merely assisting the defendant to complete the transaction.

[42] We are of the view that the more the witness sought to justify his action, the worse it becomes. Looking at the documents he prepared for the defendant to sign, it certainly goes beyond merely assisting the vendor.

[43] The documents included a letter of authorisation to act for the defendant in the sale and purchase transaction, letter authorising CIMB Islamic Bank Bhd to furnish the redemption statement and to prepare the discharge of charge documents, letter to refund the redemption sum and loan sum in the event that the transfer and charge cannot be registered for any reason whatsoever.

[44] That being the case he should have confirmed in writing whatever that the plaintiff told him with the defendant, especially with its director Dato' Zamri, if not for anything, to protect himself from a complaint to the Advocates and Solicitors Disciplinary Board.

[45] When asked in re-examination whether he had confirmed the reduction in the deposit sum he said that he had checked with his client that the defendant had agreed to the reduction. What we would have expected the solicitor to have done is to get the defendant to confirm in writing that the deposit had been so reduced. It is also equally probable that the defendant was made to sign a few copies of the SPA and that the pages in the schedule reflecting the deposit and the balance purchase price had been substituted and inserted later though the defendant's stand was that both its directors did not sign the second SPA.

[46] A solicitor cannot be a party knowingly preparing two different sets of the SPAs of the same date for the same property for the same purchase price but different sums of deposit paid. A solicitor cannot be a party to deceive the bank and more so when he already had personal knowledge that only RM1.2m had been paid in deposit as reflected in the cheques given to him before the execution of the first and second SPA for the same property and releasing the cheques to the defendant on 11 February 2015.

[47] The evidence showed that the signing on the second SPA as with the first was *via* common seal in the presence of two directors of the defendant and there was no attestation of the said solicitors PW2.

[48] Surely it must have crossed his mind how a deposit of RM1.6m had been stated in the first SPA only to have another SPA prepared for execution the same day in the second SPA for a deposit sum of RM780,000 when the cheques deposited for release is just RM1.2m. It is perhaps a case of "where ignorance is bliss, 'tis folly to be wise." He rather shut his eyes to the obvious because he does not want to know. It is a case of wilful blindness.

[49] He would have smelled and sniffed that it is likely to be an illegal moneylending transaction. The additional RM400,000 not reflected in the first SPA is more probable than not to be the interest that Dato' Zamri or the defendant has to pay the plaintiff or Dato' Adly for the loan of RM1.2m.

[50] If that amount of interest is paid then the two SPAs would be cancelled or destroyed or mutually agreed to be terminated with a full refund of the "deposit" of RM1.6m paid. Any shrewd illegal moneylender would want to leave no trace of any such transaction having dressed it as a respectable and reasonable sale and purchase transaction.

[51] The solicitor for the transaction said that the first SPA had been cancelled. We do not think so. As a second SPA was said to have been prepared after the first SPA, though on the same day, the solicitor PW2, would have wanted to protect himself and the parties, by officially cancelling or aborting the first SPA by stating it either in the recital to the second SPA or at least by letter in writing. There was nothing in any documentary evidence to show that the first SPA had been cancelled.

[52] The fact that the first SPA had been stamped by franking just like the second SPA would suggest that both were designed to convey the aura of genuineness to be used as appropriately depending on when either SPAs had to be produced in court.

[53] We do not think it makes sense to the plaintiff, to whom PW2 is more beholden than to the defendant, to have agreed to that. The reason is not difficult to find; the plaintiff is equally concerned that the defendant does not turn round to say that only RM780,000 was actually paid because there is the first SPA which would have to surface, if the defendant tries to be "funny" by disputing the deposit paid.

[54] In fact, the reason given by PW1, the director of the plaintiff, for the second SPA was that purely for the designed and limited purpose of getting a bigger loan from its bank. That being the case, there was no logical reason for cancelling and aborting the first SPA and in any event there was no document stating that.

[55] By the time the plaintiff had to sue for specific performance, there was more to lose by not exhibiting the second SPA, for if it was to exhibit the first SPA, it would be difficult for it to explain how the RM1.6m had been paid at the date of signing the SPA when only RM1.2m was released to the defendant.

[56] The benefit of getting the property by way of specific performance would far outweigh stating the deposit of RM780,000 as the cheques showing a sum of RM1.2m had been paid anyway. The bank would not bother too much if its own valuer is comfortable with the purchase price being market value or less than that for a fire sale.

[57] The plaintiff through PW1 and PW2 has not explained how the first SPA had reflected a sum of RM1.6m when only RM1.2m was paid. PW2 did not say it was a typographical error; he merely said he had PW1's instruction to change it.

[58] If indeed the first SPA had been cancelled then it is baffling that the defendant still has a copy of it and not having at all a copy of the second SPA.

[59] The learned trial judge had also found that Dato' Adly is totally not related to the plaintiff company at all. We do not think so for after all his brother is a director of the plaintiff and his son is one of the two shareholders. The device of using a company with landed assets as a vehicle for a loan of this nature rather than lending direct to an individual is of course to prevent a fallout and inability to recover if the borrower should be adjudged a bankrupt. It would also be a way to distance the lender and borrower in the individuals from the sale and purchase transaction purportedly between legal entities that are separate and distinct from their directors and shareholders.

[60] The learned High Court Judge had drawn an adverse inference against the defendant under s. 114(g) of the Evidence Act 1950 for not calling Dato' Adly and Mohd Syawal bin lsraini ("Mohd Syawal") as witnesses.

[61] We can accept the explanation of learned counsel for the defendant that initially the calling of Dato' Adly was to show the connection between him and the plaintiff and since that had been shown clearly from the SSM search result of the plaintiff where it could be seen that his brother is a director and that his son is a shareholder, the necessity to call Dato' Adly no longer arises.

[62] Like all witnesses from the other side, one must be careful as they are not likely to be confirming the defendant's narrative of events but rather contradicting it. What is given as evidence becomes part of the defendant's

case. Furthermore, there is also no withholding or suppression of evidence by not calling Dato' Adly and Mohd Syawal, the introducer as there is no suppression of evidence. It was equally open for the plaintiff to call these two witnesses to rebut the defendant's version of what had happened. In *Motorola Malaysia Sdn Bhd v. Ng Thien Keong & Anor* [2011] 5 CLJ 564, it was observed as follows:

> [25] Counsel for the 1st respondent submits that the court ought to invoke s. 114(g) of the Evidence Act 1950 against the applicant on the ground of suppression of material evidence for failure to produce the SOP. I am unable to agree with counsel. The non-production of the SOP cannot give rise to an adverse presumption and s. 114(g) is not applicable. **An adverse inference under s. 114(g) can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence** (per Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250, [1987] CLJ (Rep) 221). In the present case there is no withholding or suppression of evidence. To my mind if the Industrial Court was of the view that it should have sight of the SOP, the Industrial Court ought to have asked the applicant to produce the SOP. The failure to obtain evidence could have been resolved by the Industrial Court during the hearing but it failed to do so. Such omission ought not to be held against the applicant. (emphasis added)

[63] The adverse inference under s. 114(g) is not mandatory but discretionary, having regard to the relevancy and materiality of a particular witness (see *Lau Song Seng & Ors v. PP* [1998] 1 SLR 663 Singapore (CA)) and that withholding or suppression of material evidence is a *sine qua non*; a mere failure or non-production *per se* is insufficient (see eg, *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 at p. 494 (SC) per Mohd Azmi SCJ (as he then was); and *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 (FC) per Edgar Joseph Jr FCJ (as he then was)).

[64] The defendant gave evidence through DW4, a Director of Global Globe Maintenance Sdn Bhd, the company that received the loan sum of RM1.2m, that the said sum was withdrawn by Dato' Zamri from the company. At the end of the day, whether it is Dato' Zamri who is a borrower or the defendant, is not that important compared to whether the transaction is a moneylending transaction couched as a sale and purchase transaction in breach of the Moneylenders Act 1951.

Whether The Dissonance And Discrepancy Between The Terms Of The SPA And The Conduct Of The Parties Point Towards The Transaction Being A Security For An Illegal Moneylending Transaction

[65] We have also not lost sight of the fact that whilst normally the deposit of a SPA is normally 10% of the purchase price, here it is 30% based on a deposit of RM1.6m or 23% based on a deposit of RM1.2m. There is also a much longer completion period of six months with an automatic extension of one month instead of the more usual three months completion period.

[66] Whilst by themselves these are not conclusive, they do go some way in support of the argument that the completion period and the automatic extension would pave the way for the period within which the defendant is to repay the loan amount.

[67] The uncomfortably strange thing is that there was no formal request for extension of time to complete the sale once the completion date is up. After the six months plus one month extension had expired the parties carried on as if nothing had happened with respect to any exchange of letters to extend the completion period.

[68] We would have thought that the solicitor for the plaintiff would want to take all necessary steps to protect his erstwhile client in the plaintiff by putting in writing its request for extension of time and the defendant's consent to the extension. The fact remains that no extension was asked for and it is not for the defendant to threaten to terminate because it was not meant to be a sale and purchase agreement but a comfort as security in the event that it cannot repay the plaintiff with the agreed interest. That aside that does not lie in the mouth of the defendant as a borrower in an illegal moneylending transaction to threaten to terminate the SPA.

[69] Surely the solicitor would be concerned that if his client the plaintiff could not pay on time and there is no extension then the deposit would be forfeited, whether it be the RM1.6m or the RM780,000 or perhaps just the sum of RM1.2m for that was the amount that was given to him for transmission to the defendant. At any rate, he should be concerned that this uncertainty as to the amount that might be forfeited by the defendant may become an issue by itself. There was not a single letter produced on the extension of time.

[70] There was also the stipulated interest rate of 8% per annum on the balance purchase price for the one month extension and one would have thought even if it is extended further the interest of 8% per annum would continue to run but there is no evidence that such interest was paid. The defendant was of course silent in asking for a needy borrower should know its position in the transaction. In any event, to the defendant it was not a real sale and purchase transaction but a collateral for an illegal moneylending transaction.

[71] Then there was the request forwarded to CIMB Islamic Bank Bhd asking for the redemption statement with the letter from the defendant authorising the said solicitor to make the request. The said letter of authorisation was dated 11 February 2015 but the letter of the said solicitors Messrs Nuhairi & Co was dated 15 April 2015 asking for the redemption statement from the defendant's bank. There was a subsequent letter from the defendant to the plaintiff's bank CIMB Bank Bhd dated 12 May 2015, prepared by the Messrs Nuhairi & Co wherein the defendant undertook to refund the loan sum in the event that the transfer and charge could not be registered for any reason whatsoever.

[72] It is very clear from the difference in the font type for date of 12 May 2015 and the name and address of CIMB Bank Bhd as well as the loan amount of RM3,380,000 that these were informations obtained from their client the plaintiff later after the loan had been obtained from CIMB Bank Bhd and that the letter of 12 May 2015 was part of the bundle of documents and letters that the defendant had to sign before the so-called deposit or friendly loan was released.

[73] One wonders why it would be necessary to sign the letter of undertaking to refund the loan sum when as yet at the time of signing the SPA the solicitor does not even know which bank his client would be taking a loan from and for how much it would be approved.

[74] The reason is not difficult to find. It is to make sure that the transaction was seamless with no hiccup and that the defendant would not need to have to go back to the legal firm again to sign further documents, for who knows it may not want to do so again once it knows that there would be an actual transfer of the property to the plaintiff.

[75] PW2 as the solicitor handling the transaction reluctantly admitted that there is no proof that the letters to both CIMB Islamic Bank Bhd and CIMB Bank Bhd with respect to the redemption and discharge of charge had been sent and received by the defendant. PW2 further admitted that he had not kept the defendant posted as to the progress of the sale and purchase transaction.

[76] There was also the right of the plaintiff as a purchaser to enter a caveat against the two titles of the property as soon as the SPA was signed. Surely it cannot be the plaintiff wanted to save costs and even if it were that, PW2 would have a document signed by the plaintiff to say that it does not want to lodge a caveat over the titles, to protect himself from being sued for negligence in the event that the defendant should renege from the SPA. After all it was a good buy for RM5.2m. It must be something so basic and ingrained into the psyche of every conveyancing lawyer acting for a purchaser client to forthwith lodge a caveat on the property to protect his client's interest. After all, PW2 said his field of practice of 17 over years is in the field of conveyancing involving sale and purchase of properties and related bank loans.

[77] The caveat was only entered on 12 August 2016 after the defendant had come to know of the redemption sum being paid by the plaintiff's bank when it was informed by its bank that there is a surplus sum to be returned to the defendant. The defendant immediately objected to it and lodged a police report on 26 May 2016 on the unauthorised sale. As a further safeguard against the transfer being effected, the defendant lodged a caveat against the two titles on 9 June 2016 as reflected in the land titles exhibited.

[78] The defendant had earlier been informed by its bank that its account had already become dormant and that there was a need for it to bank in at least RM10 to reactivate the account, which from the evidence in the bank statement, the defendant duly complied on 15 May 2016 and on 25 May 2016 the surplus of the redemption sum of RM57,190.27 was banked into the defendant's account.

[79] We can accept that this is not a case where after having received the redemption sum and the surplus after redemption, the defendant had a change of mind in going through with the sale. In fact, the consistent stand of the defendant after being informed of the redemption was that its bank should refund the money to the plaintiff's bank and that the discharge documents signed by its bank should not be released to them together with all the relevant documents for the discharge.

[80] There is yet another unusual conduct of the plaintiff and its solicitors in PW2. In a case of a genuine purchase with the purchaser taking a loan from its bank, it is a condition that the difference between the balance purchase price and loan sum must be paid to the vendor or its solicitors before the loan sum is released.

[81] This is basic conveyancing practice for otherwise the purchaser's bank would have no security of the discharge of charge and transfer if after the release of the loan sum to redeem the property, the purchaser still has not been able to pay the difference between the loan and the balance purchase price. It would be a breach of both the SPA and the condition for release of the purchaser's bank loan.

[82] In the letter dated 19 October 2015 from the plaintiff's bank CIMB Bank Bhd to the defendant at p. 540 of the record of appeal, it is clearly stated that CIMB Bank Bhd undertook to release the loan sum in favour of the vendor's bank towards the full redemption of the property and the balance thereof to the vendor or the vendor's solicitors as stakeholder subject to the condition that:

> (iv) that the **difference between the purchase price of the Property and the loan sum has been paid to you** or to the relevant solicitors and **we have received written confirmation thereof** ... (emphasis added)

[83] The plaintiff's solicitors must have known of the condition precedent for the release of the redemption sum for they claim to act for the defendant for the discharge of charge armed as it is with a letter of authorisation prepared by them for the defendant to sign. Moreover, it is written in cl. 5(ii) of the SPA prepared by the solicitor himself.

[84] There was no written confirmation from the defendant produced by PW2 who had acted for the defendant as the "vendor" in the SPA that this difference between the balance purchase price and the loan had been paid.

[85] The evidence of the defendant is that it had not been paid before the redemption sum was released unbeknown to the defendant. This is very unusual if the SPA was meant to be a genuine transaction as the vendor and the purchaser's banker would not be protected if the purchaser cannot pay the balance purchase price after its bank had released the loan sum towards redeeming the vendor's property.

[86] In Messrs Nohairi & Co's letter dated 17 May 2016 to the defendant's bank CIMB Islamic Bank Bhd at p. 547 of the record of appeal, it was stated that the payment towards redemption had been made as supported by a notice of payment enclosed dated 11 May 2016.

[87] Again as a matter of prudence, no bank of the purchaser would release the loan sum towards redemption of the vendor's property after the extended completion date had expired unless there is a written confirmation from the vendor of the further extension of time.

[88] All these gaps lend credence to the defendant's assertion that it was not kept posted on the fact that a redemption of its property would be done.

[89] In fact the plaintiff's own evidence through its solicitors (PW2) is that the difference between the balance purchase price and the loan sum was only paid to his legal firm by cheque dated 18 October 2016 for RM620,000.

[90] That is most unusual and should have raised the alarm bells as it is in breach of the terms of the SPA and the terms for release of the loan sum by the plaintiff's bank CIMB Bank Bhd for it was way after the redemption sum was paid on 11 May 2016 and way after the extended completion date of 9 September 2015.

[91] It is either a case of gross negligence where a duty of care is concerned towards the defendant or a concealment of the material information to the plaintiff's bank CIMB Bank Bhd or more a case where to get a written confirmation from the defendant would alert the defendant to a matter that is not true as the payment in the difference between the balance purchase price and the loan had not been deposited with PW2's legal firm.

[92] The plaintiff's solicitors must have thought that by giving evidence of the sum of RM620,000 (based on RM5.2m - RM1.2m - RM3,380,000) being the difference between the balance purchase price and the loan sum, that would satisfy the requirement for specific performance which is that the plaintiff as the "purchaser" was able and ready to complete the purchase.

[93] Alas, that itself revealed a yawning gap that the said payment should had been made before the loan sum was released by the plaintiff's bank towards redemption of the defendant's property.

[94] In a genuine sale and purchase transaction, the solicitors concerned acting for the purchaser and here, in the explanation of the self-same solicitors, assisting the vendor as well to complete the transaction, would

want to comply with what he himself had drafted at cl. 7 of the SPA with respect to filing the prescribed form in CKHT 1A for the vendor and CKHT 2A and CKHT 502 for the purchaser pursuant to the Real Property Gains Tax 1976 within 60 days from the date of the SPA.

[95] There is no evidence that this has been complied with and this negates further the genuineness of the transaction and conversely supports the defendant's stand that the sale and purchase of the property was not meant to be transacted from the very beginning based on the assurance given by Dato' Adly that it was there only as a collateral.

[96] It is a case where the plaintiff and its solicitors get more and more tangled in a web of camouflage and caught in a comedy of errors for not coming clean on the real transaction which was that of a moneylending transaction with the SPA prepared as a collateral for the loan.

[97] Fortuitously, the plaintiff and its solicitors fumbled at those critical and telling moments that cry out for an explanation but they were not forthcoming. The facade resting on a false foundation fell with it. The dissonance was disturbing enough to destroy the cornerstone of a cover-up.

[98] We are more than satisfied that the dissonance between the terms of the SPA, the conduct of the parties and the overall circumstances of the case, more than support on the balance of probabilities the defendant's contention that the SPA and the related documents are a cloak to conceal the real substance of an illegal moneylending transaction charging exorbitant interest of RM400,000.

Whether The Sale And Purchase Agreement And Related Documents Are A Sham And Thus Not Amenable To The Remedy Of Specific Performance

[99] A sham agreement is slimily resorted to in creating a smokescreen to shield the real transaction from surfacing for the eyes of the authorities to scrutinise and sanction. Often it has less than an honourable purpose for otherwise why a sham. It is a device to divert and direct an observer the other way, if not to distract him from being detained by what is real, and often less palatable if not downright perverse. It is as old as mankind and after all there is nothing new under the sun but accepting always that sunlight is the best disinfectant and the electric light the best policeman.

[100] Often times the weaker party has no choice but to agree to sign the documents prescribed by the stronger party who is in a position to dictate. Though initially starting off as documents that the parties would not act on as in both sides understand that it would not be used, its dark side is that when the stronger controlling party reneges on it, it can be abused to serve a nefarious end.

[101] In the House of Lords case of *AG Securities v. Vaughan & Ors* [1990] 1 AC 417, Bingham LJ explained a "sham agreement" as follows:

A written agreement is a sham where it incorporates clauses by which neither party intends to be bound and which is obviously a smoke screen to cover the real intentions of both contracting parties: *Hadjiloucas v. Crean* [1987] 3 All ER 1008, 1014, per Purchas LJ. The accepted definition of a sham is that given by Diplock LJ in *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786, 802:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham' , it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v. Maclure* (1882) 21 Ch D 309, CA and *Stoneleigh Finance Ltd v. Phillips* [1965] 2 QB 537), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

[102] Put simply, a sham exists where the parties say one thing intending another (see *Donald v. Baldwyn* [1953] NZLR 313, at p. 321, per FB Adams J).

[103] In a world of genuine imitation, it is often not easy to discern a sham from what it really is in substance for those bent on perfecting the art of deception would try their level best to leave behind no trace.

[104] We therefore, with the greatest of respect to the learned trial judge, cannot accept his lament that if it really was a moneylending transaction then ironically there were no documents on the loan agreement and nothing showing the amount of the loan and the repayment and interest (see para. [33] of the grounds of judgment of the High Court).

[105] Precisely because a sham agreement can very easily be abused with the controlling party slipping into its dark side, the Court of Appeal in *Hitch And Others v. Stone (Inspector of Taxes)* (2001) STC 214 referred to the *Snook v. London And West Riding Investments Ltd* [1967] 2 QB 786 and laid down the applicable test to sniff and smoke out a sham document as follows:

> [64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
>
> [65] First, in the case of a document, the court is not restricted to examining the four comers of the document. *It may examine external evidence*. This will include the parties' explanations and circumstantial evidence such as evidence of the *subsequent conduct of the parties*.

A [66] Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

B [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. *A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them.* In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their C relationship.

[68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the D agreement as varied (see for example *Garnac Grain Co Inc v. HMF Faure & Fairclough Ltd* [1966] 1 QB 650 at 683-684 per Diplock LJ, which was cited by Mr Price).

[69] Fifth, the intention must be a common intention (see *Snook*) ... .

(emphasis added)

E **[106]** The above test was followed by our Court of Appeal in *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] 1 LNS 661; [2019] MLJU 1552 where Abang Iskandar JCA (now CJSS) observed as follows:

F [46] It had been observed that the policy considerations that underpin the concept of sham are the protection of the rule of law, to prevent abuse of fundamental legal principles and the prevention of evasion of statutes, among others. It was also commented that the *Snook* case (*supra*) had narrowed down the test for sham. See the relatively recent case of *Autoclenz Ltd v. Belcher* [2011] UKSC 41, a landmark case in the UK on G labour law and contract law; and the related article by Toby Graham, appearing in *Trusts and Trustees*, volume 22, Issue 8, October 2016. Indeed, on the authority of the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v. Arab Malaysian Prima Realty Sdn Bhd* [2001] 1 MLJ 324, **the courts are entitled to go behind the impugned agreement or transaction to ascertain the true nature of such agreement or transaction**. In the case of *Lori* H *Malaysia Bhd v. Arab Malayasian Finance Bhd* [1999] 2 CLJ 997, it was there observed by our apex court that in other Common Law countries, courts were slow to declare commercial contracts as void on ground of illegality, but having said that if the circumstances so warrant, the courts would not shy away, from doing what would be in accord with what the law expects to be done, as a keeper of the public conscience. The fact that the apex I court had done that could be seen in the recent case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 FC, among others. (emphasis added)

[107] The dissonance that we observed between the terms of the SPAs and the conduct of the parties are disturbing. The fact that basic terms are flouted or not followed would point to the parties having a comfort level that could only be achieved because of a separate arrangement and agreement.

[108] How else could one explain why a caveat was not lodged upon the SPA being signed for a RM5.2m purchase price and a rather good bargain at that until after a year later after the defendant had lodged a police report and objected to the release of the title and discharge of charge documents to the plaintiff's solicitors from the defendant's bank. What about the need to obtain a written consent to extension of time after the extended completion date had expired? Wouldn't the plaintiff and its solicitors be concerned that the SPA would be terminated by the defendant as the "vendor". The confirmation becomes more necessary and critical when the plaintiff's bank was required to release the loan sum towards redemption of the property way after the extended completion date.

[109] Who gave the plaintiff permission and leeway to pay the difference between the balance purchase price and the loan sum of RM620,000 way after the plaintiff's bank had released the loan sum? In fact, the sum of RM620,000 was only paid on 18 October 2016 way after the loan sum of RM3,366,000 was released on 11 May 2016 towards redemption. It was done to shore up the plaintiff's claim for specific performance when the plaintiff should have complied earlier with the condition of the disbursement of the loan sum towards redemption and also a matter that the court can take judicial cognisance of, if not judicial notice, that it is a normal conveyancing practice that the purchaser/borrower must have first paid the differential sum with its solicitors as stakeholder before any loan sum may be released to the vendor's bank.

[110] The learned trial judge misdirected himself when he held at para. [25] of his grounds of judgment that it had been proved that RM5.2m had been paid by the plaintiff to the defendant in that RM1.2m had been paid as deposit and RM3,366,000 as redemption of the defendant's loan with its bank and the surplus after redemption of RM57,190.27 had been paid to the account of the defendant to complete the full payment of the purchase price of RM5.2m. That cannot be correct because the math does not add up. That surplus was an overpayment of the redemption sum and so it was refunded to the defendant.

[111] Whilst granted that typographical errors are common where RM1.6m stated to be the deposit paid under the first SPA is concerned, this is more a case of a Freudian slip for at that time the full cheques amount of RM1.2m had already been given to PW2 on 5 February 2015 and the first SPA was signed on 9 February 2015. It is a sum expressed in words and figure and is not a typographical error but a conscious decision to have it expressly stated as such to reflect the interest on the loan of RM1.2m.

[112] Of course when the defendant having found out that the sham agreement would be used to effect an actual transfer with the redemption sum having been paid by the plaintiff's bank, its director Dato' Zamri (DW3) quickly lodged a police report on 26 May 2016 that the defendant had never agreed to sell the property to the plaintiff. By that time, instead of losing it all the plaintiff had rather settled for what it could prove which is the RM1.2m represented in the cheques that were cleared and to forgo the RM400,000. At any rate it is more likely than not that the market value would be higher than RM5.2m and at any rate the plaintiff's solicitors had not disclosed the government valuation of the property for the purpose of payment of stamp duty. Under the SPA, the plaintiff's solicitors were required to adjudicate the memorandum of transfer in the Form 14A of the NLC as stated in cl. 5(i) and more so when a loan is to be obtained by the plaintiff as confirmation of the difference between the balance purchase price and the loan sum had to be paid to the plaintiff's solicitors as a stakeholder before any loan sum is released towards redemption of the defendant's property.

[113] The defendant has not given this confirmation and PW2 as the solicitor for the plaintiff had not produced any confirmation of this to the plaintiff's financier's solicitors before the loan sum was released towards redemption.

[114] If his reason for non-disclosure is that he had not proceeded to send for adjudication the transfer instrument in the Form 14A of the NLC then that would further militate against the plaintiff's contention that it was a genuine SPA.

[115] The court can take judicial notice of the fact that landed shop offices in Kuala Lumpur would generally appreciate through the years and here the property was purchased at the beginning of 2010 for RM4.7m – see p. 388 of the record of appeal where the date of the sale and purchase agreement with the developer is not stated but the land search at p. 365 of the record of appeal states the transfer from the developer to Global Globe (M) Sdn Bhd, an associate company of the defendant as stated by PW2, to have been effected on 26 May 2008 and then transferred to the defendant on 19 November 2010.

[116] Then at p. 401 is the loan offer from the defendant's bank CIMB Islamic Bank Bhd dated 16 March 2010. We can surmise this appreciation because for a financing of 240 months or 20 years the bank's selling price for the Islamic financing is fixed at RM9,941,121.60.

[117] The credibility of PW1 and PW2 is very much at stake for PW1 openly admitted that the second SPA of RM780,000 deposit was meant for the eyes of the plaintiff's bank to get a bigger loan margin. That kind of tongue-in-the-cheek confession does not augur well for the credibility of PW1 who often times had to request for simple questions asked in cross-examination to be repeated as can be seen in the notes of evidence.

[118] PW2 as the solicitor for the sham transaction prefer not to know and indeed was a party who knowingly participated in the second SPA being printed and executed at least by the plaintiff and stamped without even thinking of cancelling the first SPA if indeed it had been cancelled.

[119] The whole unconvincing episode led thus to three sums stated as deposit: RM120,000 in the statement of claim, RM1.4m in the first SPA and RM780,000 in the second SPA.

[120] The deposit to the plaintiff does not really matter for it already had the defendant in its full grip. It is more likely than not that the second SPA was not given to the defendant and the plaintiff must have thought that it is better to exhibit the second SPA for the loan was approved based on the second SPA and furthermore, it would not have to explain why there was a stated RM1.6m paid under the first SPA. Alas, but for the vigilance of the defendant's solicitors this discrepancy might not have been discovered for both were dated and stamped the same date with the only amendment being found only on one page – the first page of the second schedule to the second SPA.

[121] It is a given that courts too will not lend its aid to enforce pretended obligations. Only real obligations will be enforced (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349; [2003] 3 MLJ 257 (FC); *Seascope Sdn Bhd v. Syed Syed Izhar Syed Salleh* [2005] 8 CLJ 624; [2006] 3 MLJ 756 (HC); *Lee Pooi Chun v. Lee Kah Gee* [1971] 1 LNS 59; [1971] 2 MLJ 67 (FC); and *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] MLJ 143; (PC)). This is particularly so in the context of an illegal moneylending transaction when the law has been made stricter with the 2003 Amendment and 2011 Amendment to protect the more vulnerable borrower from the abuses of the lender who would want to go for its pound of flesh.

[122] Having started off as a sham agreement, good for the optics, the plaintiff cannot have transformed it into a real one and go for the jugular. It becomes an instrument to oppress and exploit which the law would intervene to protect the more vulnerable victim. The principle of estoppel as encapsulated in s. 115 of the Evidence Act 1950 would apply:

> 115 Estoppel
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[123] Lest it be said that a sham agreement cannot be countenanced in the light of the parol evidence rule in s. 92 of the Evidence Act 1950 ("the Evidence Act"), one can take refuge on the learned commentary by *Sarkar on Evidence*.

[124] Section 92 of the Evidence Act reads:

> Section 92 - Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

[125] *Sarkar's Law of Evidence* (LexisNexis, Malaysian edn, vol. 11) at p. 2212 explains the non-applicability of s. 92 of the Evidence Act as follows with respect to sham agreements:

> Section 92 does not preclude a party from showing that the writing was not really the contract between the parties, but was only fictitious or colourable device which cloaked something else ... **Oral evidence is admissible to show that it was only a sham or nominal transaction and was not intended to be acted upon**, or to show that a written for the conveyance of property was only a fictitious sale to avoid execution proceedings against the property, or that a certain receipt is fictitious in the sense that no money was paid. (emphasis added)

[126] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779, the court adopted the approach of the Indian Supreme Court in *Gangabai v. Chhabubai* AIR [1982] SC 20, and clarified as follows:

> In my judgment, s. 92 of the Evidence Act had nothing whatever to do with this case. The judge was in error when he thought that it did. *The appellants were not seeking to admit evidence to contradict the terms that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements*. That this is permissible is settled by high authority. I will not go through all the cases here. Suffice that I mention just one. (emphasis added)

[127] In *Pannir Selvam Sinnaiyah & Anor v. Tan Chia Foo & Ors* [2019] 1 LNS 2031; [2019] MLJU 1699, a case where the argument of a sham agreement in the form of a sale and purchase agreement asking the underlying illegal moneylending agreement was upheld, Evrol Mariette Peters JC observed as follows:

> [26] In my view, reliance on the parol evidence rule by the First Defendant is misconceived, as the Plaintiffs are not denying that they signed all the documents in question. **The oral evidence by the Plaintiffs** in court was

> not for the purpose of contradicting, varying, adding to or subtracting the terms of the Agreement, but to **explain that these documents were a façade to an illegal moneylending scheme**.
>
> [27] The argument of Counsel for the First Defendant is, therefore, misconceived, as the oral evidence of the First Plaintiff was not caught by the exclusion of parol evidence rule, as envisaged by sections 91 and 92 of the Evidence Act.
>
> [28] Furthermore, it is trite law that section 92 presupposes the validity of the transaction evidenced by the document. **If the validity of the transaction is in question, and if it is being disputed, then the court is not bound by what has been described as the paper expression of the parties**. (emphasis added)

[128] We are more than convinced on the balance of probabilities that the SPAs are a sham, standing up like a sore thumb, when its terms are brushed aside with no compunction of what tomorrow may bring simply because undergirding it is the real transaction of illegal moneylending business where the plaintiff is more than secured, both in the sense of collateral and legal position, to act leisurely and "legally" as it may be pleased.

[129] The SPAs are unenforceable especially when the remedy of specific performance prayed for is an equitable remedy.

Whether The Sale And Purchase Agreement And The Loan Agreement Are Unenforceable Being Not In Compliance With The Moneylenders Act 1951

[130] Assuming for a moment that the SPAs were not a sham but genuine transactions, it is our finding that the agreements prepaid are not in compliance with the Moneylenders Act 1951 and hence unenforceable for the reasons discussed below.

[131] The Moneylenders Act 1951 is very strict with respect to illegal moneylending because of the special vulnerability of borrowers in need who are at the mercy of the "alongs" or loan sharks as these illegal moneylenders are referred to who would resort to even harassment and criminal intimidation to recover their exorbitant interest upon interest.

[132] It is a social ill that is difficult to be stamped out. In the light of the nebulous problem faced Parliament made some major amendments to the Moneylenders Act 1951 *via* the Moneylenders (Amendment) Act 2003 which came into force on 1 November 2003.

[133] Section 2 defines "moneylending" to mean "the lending of money at interest, with or without security, by a moneylender to a borrower."

[134] As to what is interest the Moneylenders Act 1951 introduced this definition of "interest" as follows:

> "interest" does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable

A by law and legal costs but, save as aforesaid, **includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan**;
(emphasis added)

[135] The definition of "moneylender" is as follows:

B "moneylender" means any person who **carries on** or advertises or announces himself or holds himself out in any way as carrying on **the business of moneylending**, whether or not he carries on any other business; (emphasis added)

[136] There was also another amendment effected to the Moneylenders Act C 1951 which came into force on 15 April 2011. It introduced s. 10OA which according to the explanatory statement to the bill, it seeks to facilitate the proof of business of moneylending. Section 10OA makes even more difficult for lender who had charged interest on the loan given to say it was a one-off transaction by allowing a legal presumption to be drawn against the lender D as follows:

Presumption as to the business of moneylending

10OA. Where in any proceedings against any person, it is alleged that such person is a moneylender, **the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying** E **on the business of moneylending**, until the contrary is proved.
(emphasis added)

[137] A brief evolution of the amendments brought to the Moneylenders Act 1951 by the 2003 Amendment and the 2011 Amendment can be found in the case of *Menta Construction Sdn Bhd v. SPM Property & Management Sdn Bhd* F *& Anor* [2017] 1 LNS 675; [2017] MLJU 526 as follows:

[98] There were major amendments introduced on 1 November 2003, with respect to the Moneylenders Act 1951. The changes brought about by the Moneylenders (Amendment) Act 2003 (MAA 2003) Act A1193 - PU(B) 332/2003. The watershed amendment was in the definition of G "moneylender" which was amended to read:

> "moneylender" means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

[99] Under such a definition, it would appear that even a single transaction would be caught if the agreed amount to be repaid would be H more than the amount lent if one is not a licensed moneylender. Parliament must have realised that the net might have been cast too broadly such that even genuine friends who want to help might be caught even if they were to merely charge the borrower the costs of their funds.

[100] There was a further amendment effected in 2011 (*vide* Moneylenders I (Amendment) Act 2011) of which the definition of "moneylender" under the old regime (Moneylenders Act 1951) has been re-introduced and re-adopted again. In *Leong Chooi Peng v. Tee Yam* [2011] 1 LNS 1709, I had made this comment at the postscript as follows:

> Perhaps Parliament has cast its net too wide in that in trying to stamp out the bad loan sharks it had also stymied the benign friends who can only be beneficial when in one's hour of need, help comes in a friendly loan where a borrower would not mind covering the cost of fund of the lender. Call it interest, call it a consideration of a larger sum being repaid - it is a harsh reality in a real world where the love of money in as much as the lack of money is a root of all kinds of evil. There seems to be a change of heart in the Moneylenders (Amendment) Act 2011 (Act A 390) which came into force on 15 April 2011 vide P.U.(B) 174/2011. 'Moneylender' has now been redefined to mean any person who carries on or advertises or announces himself or holds himself out in any way as **carrying on the business of moneylending, whether or not he carries on any other business. A new section 10OA** now reads:
>
> > Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.
>
> Being a rebuttable presumption, those cases that deal with the meaning of 'the business of moneylending' as referred to in *Muhibbah Teguh*'s case (*supra*) might well prove relevant again in the future in resolving a once-off friendly loan transaction with interest. (emphasis added)

[138] Therefore, even though this appears to be a once-off or one-off transaction, the burden has now shifted to the lender to show that it is not in the business of moneylending. The guidance provided in the case of *Muhibbah Teguh Sdn Bhd v. Yaacob Mat Yim* [2005] 4 CLJ 853 would be helpful where Vincent Ng J (as he then was) held, at p. 857:

> It is axiomatic that one or two moneylending transactions (even in consideration of a larger sum) does not make the lender a moneylender within the purview of the definition of 'moneylender' in s. 2 of the Act. It is also axiomatic that the Act is intended to apply to moneylenders exclusively and not to moneylending transaction or transactions *per se*. This statement of law was again affirmed by Federal Court in *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169; [1981] 1 MLJ 14 which I shall discuss later in this judgment. (See also *Cheong Kim Hock* [1992] 2 SLR 349, *Lek Peng Lung* [1992] 2 SLR 150 and *Subramaniam Dhanapakiam* [1991] 2 MLJ 447.)

[139] We had held that the interest element is in the RM400,000 reflected on the first SPA which we had held was never cancelled, the question is whether a single transaction shown can make the plaintiff a moneylender. It is not in dispute that the plaintiff does not have a moneylending license. In the light of the presumption in s. 10OA of the Moneylenders Act 1951, a presumption is drawn that it is a moneylending transaction.

[140] The plaintiff had not adduced any evidence to rebut the presumption and the stand taken by the plaintiff was that it was a sale and purchase of property transaction. Having made that election, the plaintiff cannot resile from it and indeed did not lead evidence to rebut the presumption.

[141] The plaintiff being an unlicensed moneylender the agreement is unenforceable as s. 15 of the Act declares as follows:

> **Contract by unlicensed moneylender unenforceable**
>
> 15. **No moneylending agreement** in respect of money lent after the coming into force of this Act by an **unlicensed moneylender shall be enforceable**. (emphasis added)

[142] The law in the Moneylenders Act 1951 requires all "moneylending agreement" to be in writing and here the agreement is oral and what was in writing was a sham sale and purchase agreement. Section 2 is clear in its definition of "moneylending agreement" as follows:

> "moneylending agreement" means **an agreement made in writing** between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender; (emphasis added)

[143] By keeping the moneylending agreement oral but by getting the upper hand in making the defendant borrower signed all the relevant documents relating to and including a sale and purchase agreement, the plaintiff was visibly trying to take the moneylending transaction outside the pale and protection afforded to a borrower under the Moneylenders Act 1951.

[144] With no trace of a written document on moneylending the plaintiff thought it had succeeded in its strategy to stultify the application of the Moneylenders Act 1951.

[145] Even for a case of a licensed moneylender if there is no written agreement on the terms of the moneylending agreement, the said oral agreement is unenforceable by virtue of the clear provision of s. 16 of the Act as follows:

> Moneylending agreement to be given to the borrower
>
> 16. (1) **No moneylending agreement shall be enforceable** unless the agreement has been **signed** by all the parties to the agreement and a copy of the agreement duly **stamped is delivered to the borrower** by the licensee before the money is lent.
>
> (2) A licensee who executes a moneylending agreement which does not comply with this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both." (emphasis added)

[146] Section 27 of the Moneylenders Act 1951 requires the moneylending agreement to be attested by an Advocate and Solicitor of the High Court but there was no attestation by PW2 in the so-called security documents in the SPA. Additionally, the said solicitor is required under s. 27(2) to explain the terms of the moneylending agreement to the borrower and shall certify on the agreement that the borrower appears to understand the meaning of the terms of the agreement.

[147] Section 27(3) further provides that any moneylending agreement which is not so attested shall be void and have no effect and shall not be enforceable.

[148] The Act also makes a moneylending agreement where the interest charged is more that 12% per annum for a secured loan and 18% per annum for an unsecured loan to be "void and have no effect and shall not be enforceable" under sub-s. 17A(1) and (3). The interest charged is clearly way beyond the prescribed 12% per annum seeing that the property was to be used as a security.

[149] Regulation 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 ("the Regulations") provides that every agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and makes it a criminal offence for non-compliance.

[150] Regulation 10(2) of the Regulations declares as void and of no effect and unenforceable any agreement for moneylending not in compliance with the prescribed form and in this case Schedule K and includes addition to the prescribed form. A sale and purchase agreement is not a proper moneylending agreement in compliance with Schedule K.

[151] The SPA signed is not an acceptable security under Schedule K of the Regulations, for under the National Land Code ("NLC"), security transactions recognised are charges and statutory liens as set out in ss. 241 to 281 of the NLC. Whilst our courts have recognised a jual janji transaction as enforceable under contract law, this is an outright sale as projected and painted by the plaintiff and is certainly not a jual janji transaction. Moreover, the plaintiff had not asserted that it is one.

[152] The device of using a sale and purchase agreement as a security for a loan is clearly to circumvent the protective provisions of the Moneylenders Act 1951. Even if the plaintiff lender is not a moneylender at all, it would be an aberration to allow such a person to charge interest of RM400,000 for a loan of three months when even a licensed moneylender would blush under it. A person who is not a moneylender cannot under the guise of a friendly loan exact more onerous terms than what a licensed moneylender is permitted as that would turn the law upside down.

[153] The protection afforded by a charge or a lien is that a proper application for an order for sale under the NLC have to be proceeded with to realise the security with the need to apply to the High Court in case of a

registry title and the need to exhibit the necessary current valuation report of the property charged for the purpose of fixing the reserve price at the public auction. All these to be preceded by the service of a notice to remedy the breach as prescribed under the NLC and with the implementation now of e-lelong, there is a further enhancement to the integrity of the public auction system where only those genuinely interested to bid may do so.

[154] The transaction is illegal as it is forbidden by the Moneylenders Act 1951 and further, if allowed, would defeat the purpose of the law. It would also be against public policy. The transaction is caught by s. 24(a), (b) and (e) of the Contracts Act 1950 that provide as follows:

> **24 What considerations and objects are lawful, and what not**
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is **forbidden by a law**;
>
> (b) it is of such a nature that, **if permitted, it would defeat any law**;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or **opposed to public policy**.
>
> (emphasis added)

[155] Even if the sale and purchase agreement is not a sham and that the plaintiff is not a moneylender, the relief of specific performance being an equitable relief would not be granted in a case where the plaintiff lender had openly flouted the requirement of creating a proper charge or statutory lien under the NLC as security for the friendly loan.

Pronouncement

[156] For all the reasons given above, we were satisfied that the learned trial judge had misdirected himself and had not sufficiently appreciated the evidence before him which pointed inexorably to the proper inference to be drawn that indeed the sale and purchase transaction was designed to disguise a moneylending transaction and an illegal one at that. The sale and purchase agreement is illegal, null and void and unenforceable.

[157] As the learned trial judge had been plainly wrong in the light of the dissonance between the agreed written terms and the conduct of the parties as referred to above which should have alerted him to probe further and to weigh the probabilities of the case, we were constrained to set aside the order of the High Court for specific performance and assessment of damages and consequently to allow the defendant's/appellant's appeal.

[158] We also allowed costs of RM40,000 here and below to the defendant/appellant subject to the payment of allocatur.